United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1335

Docket No. 76-1335

To be argued by
HAROLD DUBLIRER

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

MICHAEL DEMICHAELO, PETER VARIANO, LAWRENCE CENTORE, JOHN MONACO, MICHAEL PICCIANO, MICHAEL EVANGELISTA, ANTHONY RUSSELLO, and HENRY BUCCI,

Defendants-Appellants,

JAMES OSTRANDER, ALFONSO COLETTI, MICHAEL VANNICELLI, WILLIAM MURTY, and FRANK CALIELLA,

Defendants.

DEFENDANT-APPELLANT EVANGELISTA'S BRIEF

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DEFENDANT-APPELLANT EVANGELISTA'S BRIEF

STATEMENT

Defendant-appellant Evangelista appeals from an order of Hon. Robert L. Carter, D.J., made on April 21, 1976 which denied Evangelista's pre-trial motions. Evangelista also appeals from Judge Carter's oral order after hearing (Transcript 4/26/76, p. 155) which denied Evangelista's motion to vacate all eavesdropping orders in the case and to suppress evidence obtained thereby.

Defendants had been indicted on two counts, (1) conspiracy, 18 USC §371, and (2) illegal gambling business, 18 USC §§1955 and 2 (Joint Appendix A-7 to 13).

Thereafter, on April 27, 1976 (Transcript, left hand numbers, pp. 2-14, right hand numbers, pp. 286-299) Evangelista pleaded guilty to Count Two, reserving his right to appeal from Judge Carter's pre-trial rulings (Transcript 4/27/76, left hand numbers, p. 6, right hand numbers, p. 299). U.S. v. Burke, 517 F. 2d 377, 379 (2 Cir. 1975).

Evangelista was sentenced to one (1) year imprisonment, all but 30 days suspended. He is presently at liberty.

This brief is limited to a discussion of Evangelista's appeal from the order denying his motion to suppress. We join in the arguments of the co-defendants with respect to the appeal from other parts of Judge Carter's decision on pre-trial motions.

FACTS

The facts, so far as pertinent to the motion to suppress, are as follows:

On November 8, 1974, the County Judge of Westchester County, New York, issued an order authorizing interception of "certain telephone communications and wire communications" over a certain telephone from November 8, 1974 up to December 7, 1974 (Joint Appendix A-23-26).

As a result, Evangelista was arrested by New York police officers and the FBI in December, 1974. The New York State charges were dismissed in the Criminal Court of the City of New York, County of Bronx, for lack of prosecution.

In February, 1976, Evangelista was re-arrested by the Federal authorities (Joint Appendix A-17).

Despite these arrests, Evangelista never received any post-surveillance notice. As of March 18, 1976, the date of the motion to suppress, no such notice had been received (Joint Appendix A-15). The Government admitted its failure to notify Evangelista (Transcript p. 149).

POINT I

THE NEW YORK STATUTE AND NEW YORK LAW REQUIRE THE SUPPRESSION OF EVIDENCE OBTAINED BY A WIRETAP ORDER WHERE THERE HAS BEEN NO POST-TERMINATION NOTICE.

Since the motion to suppress was addressed to evidence obtained through a wiretap order issued by a New York Judge under New York law, this Court is bound by New York law. U.S. v. Capra, 501 F. 2d 267, 276 (2 Cir., 1974), cert. denied 520 US 990.

In U.S. v. Principie, 531 F. 2d 1132 (2 Cir., 1976) this Court rejected the contention that wiretap evidence obtained under a New York State warrant must be suppressed because the Government failed to notify the defendants of the eavesdropping within 90 days after it terminated on the ground that there was no showing of actual prejudice to the defendants from the Government's failure to provide timely notice.

In Principie, this Court held (531 F. 2d at p. 1142, note 12) that the reference to suppression in People v. Hueston, 34 NY 2d 116 (1974), is dictum and that the question whether suppression is necessary without a showing of prejudice is still open in New York.

This Court also (531 F. 2d 1140, note 11) rejected the characterization that New York law is more restrictive than Federal law on the subject, alluding to the fact that although two New York cases have adopted the total suppression remedy, both are lower court decisions and neither purports to adopt the view that New York has a different and stricter view than that required by Federal law.

We suggest that two points peculiar to New York law and never before urged on this Court require reconsideration of the Principie principle that a defendant who seeks to suppress for lack of post-termination notice evidence obtained by a Government wiretap must prove that he was prejudiced by such lack of notice.

I.

The New York statute, Criminal Procedure Law §700.50, differs from the federal statute, 18 USC §2518(8)(d) on the subject of post-termination notice in at least one significant respect. Although both statutes require that notice of the wiretap be given to the parties to the intercepted communications

within 90 days after the termination of the tap, they are distinct in their requirements to extend the time for giving the statutory notice.

New York CPL §700.50(4) makes it a condition for an extension of time to give the notice that the Government show "exigent circumstances" for the extension. This is strong language, as can be seen from CPL §700.05(7) defining the term "exigent circumstances". The statute places the burden of persuasion for obtaining the extension on the Government and it sets a high standard for the Government to meet if it is to obtain an extension.

The federal statute contains no such requirement for a showing of "exigent circumstances" by the Government. 18 USC §2518(8)(d).

In the case at bar, the Government gave no post-surveillance notice at all in arrant disregard of the statute. In effect, the Government took the law into its own hands and unilaterally gave itself an indefinite extension of time to give the notice without any basis at all, much less a showing of "exigent circumstances".

The Principie principle--that a defendant who seeks to suppress for lack of post-termination notice evidence obtained by a Government wiretap must prove that he was prejudiced thereby--places the burden for testing whether such an indefinite extension of time is justified upon the defendant. While this may be

roper under the federal statute, and there is difference of
inion on that score as this Court has recognized*, it
rtainly contradicts the express language of the New York
atute. We suggest that the requirement for a showing of
xigent circumstances" by the Government plays a "central role
the statutory scheme". U.S. v. Giordano, 416 US 505, 528.

The Government's failure to give any notice at all
a brazen violation of the New York statute. For the Court to
lieve the Government of the burden of showing "exigent
rcumstances" to obtain an indefinite extension of time to
ve notice and, instead, place the burden on the defendant to
ow that he was prejudiced by such Government misconduct, is
turn the statute completely around.

II.

In U.S. v. Principie, 531 F. 2d 1132 at p. 1140, note 11,
is Court rejected the contention that the New York law is more
estrictive than the Federal and that, although two New York
ases have adopted the total suppression remedy, both were
ower court decisions. That situation no longer obtains.

In People v. Brenes, 385 NYS 2d 530 (App. Div., First
epartment, July 6, 1976) a New York Appellate Court opted for
he total suppression remedy. That case involved what the
ourt characterized as the "total and complete disregard of the

*See cases cited in Principie, 531 F. 2d at p. 1141.

minimization standard specified by the statute" (385 NYS 2d at p. 532).

The Court said (385 NYS 2d at p. 532):

> "If we are '[t]o guard against the realization of Orwellian fears' (United States v. Manfredi, 2 Cir., 535 F. 2d 697, 698), strict constitutional and statutory standards for the permissible use of electronic surveillance operations must be complied with."
>
> * * *
>
> "The blatant violation of the statute by the police mandates total suppression of all monitored conversations and of the tainted fruits thereof as the only effective deterrent against such egregious misconduct."

The concurring opinion is equally emphatic (385 NYS 2d at p. 534):

> "The implication is clear: Where there are blatant violations total suppression will be enforced. In the instant case the police did not bother to even attempt minimization."
>
> "In my view, total extirpation of all intercepted calls in this case is mandated."

In the case at bar, the Government blatantly violated the statute. It did not bother to even attempt to give notice. Such blatant violation of the statute "mandates total suppression of all monitored conversations and of the tainted fruits thereof as the only effective deterrent against such egregious misconduct" (People v. Brenes, 385 NYS 2d at p. 532).

What the Court said with regard to police disregard of the minimization standards of the New York statute is equally applicable to the notice provisions of the statute. Wiretapping is still "dirty business". We have finally come around to accept it but only under strict safeguards. "The dangers and susceptibility to abuse inherent in unrestrained electronic surveillance are too well known and documented to require elaboration." People v. Brenes, 385 NYS 2d at p. 531.

The Government, like any citizen, should not be permitted to flout the law.

CONCLUSION

The order of the court below denying Evangelista's motion to suppress the evidence obtained by wiretap should be reversed and his plea of guilty set aside.

We also adopt the points raised by co-appellants in this case so far as relevant to Evangelista.

Respectfully submitted,

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